United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7387

United States Court of Appeals

For the Second Circuit.

Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company,

Plaintiff-Appellee,

v.

Bankers Life and Casualty Company, Irving Trust Co., Belgian American Banking Corporation, Belgian American Bank & Trust Company, Garvin Bantel & Company, New England Note Corporation, The Estate of George K. Garvin by Ruth N. Garvin, The Estate of James P. Begole, by Patricia C. R. Begole, as Executrix, John F. Sweeney, The Estate of Standish T. Bourne, by Standish T. Bourne, Jr.,

Defendants-Appellees,

and

Harry Berg and Florence H. Brandenburg, Executrix,

Intervenors-Objectors-Appellants.

APPELLANTS' REPLY BRIEF

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POINT I

APPELLEES INCORRECTLY ARGUE THAT THE STERILE STATE COURT HAD THE RIGHT TO USURP JURISDICTION OVER MCC'S EXCLUSIVELY FEDERAL SEC. 10(b) CLAIM AND OUST THE FEDERAL COURT OF ITS EXCLUSIVE JURISDICTION

(Answering Appellee's Point I)

On pages 7 to 9 of their brief, appellees concede that the state court action, in which nothing was done for seven years until the Superintendent made his application in that court for leave to settle both actions, did not assert a Sec. 10(b) claim; that the state court action pleaded only common law fraud, conversion and negligence; that the Superintendent did not assert MCC's Sec. 10(b) claim in the state court because under Sec. 27 of the Exchange Act, it was a federally exclusive claim; that the Superintendent brought the Sec. 10(b) action in the Federal court because the Federal exclusivity of the claim required that it be brought only in the Federal court; and that "no attempt was made by the Superintendent to vest the state court with jurisdiction to determine a claim brought under the Exchange Act of 1934." (Appellees' Brief p. 9). Appellees then argue that there was no need for the state court, in determining the Superintendent's application for leave to settle and compromise the actions in both courts, to give consideration to the Sec. 10(b) claim, because "what he sought was only a determination that the settlement of his action was fair and reasonable and this determination can and must be made only in the state court" (Appellees' Brief p. 9), and that in determining the fairness and reasonableness of the settlement, there was no need for the court to weigh the probabilities and possibilities of a Sec. 10(b) victory at a trial against what is being proposed in the settlement as

required by the cases cited by appellants on page 7 of their main brief, because those cases are either class actions or derivative actions and the case at bar is not such an action (Appellees' Brief pp. 11-12).

The argument of the appellees is a confusion of contradictions.

Regardless of whether the Sec. 10(b) action, brought by the Superintendent on behalf of MCC, is a class or derivative action, in determining whether the proposed settlement of a claim is fair, a court *must* determine the probabilities and possibilities of a recovery at a trial against what is being proposed in settlement. This court has recently spelled out some of the factors which are relevant to a determination of the fairness of a settlement.

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974)

In *City of Detroit*, this court listed some of the factors which are relevant to a determination of the fairness of a settlement, as follows at 495 F.2d 448, 463:

> ". . . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . ."

The essence of this amplification of the factors necessarily to be considered in determining the fairness of the settlement, is the probabilities and possibilities of a recovery at a trial. As shown by us on pages 10-11 of our main brief, even the State Supreme Court realized this.

So rigid is this weighing requirement, that in a recent case decided by the United States Court of Appeals for the Third Circuit on July 25, 1975, the court held that where the District Court purported to give consideration to the above factors but in fact gave boiler plate approval to a settlement which was phrased in appropriate language but was unsupported by a proper evaluation of the facts and analysis of the appropriate law, the Court of Appeals reversed the approval of the settlement and held that the District court "did not live up to its fiduciary responsibility . . . in approving the settlement based upon the inadequate record before it."

Girsh v. Jepson, No. 74-2030 (3rd Cir., July 25, 1975). P. 9*

As appellees now admit [illegible]r above argument, and as shown by us on pages 10-11 of our main brief, in the case at bar, the State Supreme Court did not even give consideration to the potentials of recovery of the Sec. 10(b) action. It disregarded the Sec. 10(b) claim, treated the settlement as if it involved only a common law claim, and then authorized dismissal not only of the common law claim, but as well, of the Sec. 10(b) claim.

We submit that regardless of whether MCC's Sec. 10(b) action was a class action or a derivative action, court determination as to the fairness thereof could be made in accordance with the "fiduciary responsibility" of the court to MCC, its sole stockholder and its creditors, only if appropriate consideration were given to the potentials of recovery in light of the proferred settlement. Since, as appellees admit, the state court had no right to do this as to the Sec. 16(b) claim, it had no jurisdiction to authorize the Superintendent to settle it and its determination is a nullity.

A case recently decided by the United States Court of Appeals for the Seventh Circuit, is in point.

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*Since the opinion in *Girsh v. Jepson* appears not to have been reported, we annex it in full as an appendix to this reply brief.

McGough v. First Arlington National Bank,
CCH Fed.Sec.L.Rep. Par 95,246 (7th Cir., 1975)

In *McGough*, the Bank commenced an action in the state court against McGough based upon a promissory note and its security. Two months later, McGough commenced an action in the United States District Court under the Securities Act of 1933 and the Exchange Act of 1934 predicated upon the same facts as those which gave rise to the making of the promissory note by McGough. In the District Court, the Bank made a motion for a stay of that proceeding and it was granted. Upon appeal, the Court of Appeals for the Seventh Circuit, on the basis of *Movielab v. Berkey Photo,* 321 F.Supp. 806 (SDNY 1970), affirmed 452 F.2d 662 (2d Cir. 1971), reversed, and held, on the basis of the teaching of *Movielab,* that it was an abuse of judicial discretion for the District Court to stay itself because that would relegate McGough to a "sterile state court" for vindication of exclusively federal remedies. The Seventh Circuit said at CCH Fed.Sec.L.Rep. Par 95,246 p. 98,274:

> "Accordingly it is manifest to us that the exclusive federal remedy sought under the complaint in the District Court is not available to McGough in the State action. Therefore, we conclude that the District Court's stay order was an abuse of judicial discretion and reversible error, since it relegated McGough to a sterile state court for vindication of its federal remedies.
>
> "In *Movielab, Inc. v. Berkey Photo, Inc.*, 321 F.Supp. 806 (S.D.N.Y. 1970), *aff'd*, 452 F. 2d 662 (2d Cir. 1971), the District Court was faced with the identical situation as presented here. That court teaches at 811:
>
> " 'The pendency of the state court suit, therefore, does not offer a valid basis for precluding [McGough] from prosecution in [the District Court] of its affirmative claim for [Exchange Act relief] which [relief] it cannot obtain in the state court because of our exclusive jurisidction over affirmative claims based on the Exchange Act.' "

In the case at bar, Justice Brieant determined not only that the Federal court is bound by the determination of the "sterile state court" even though he assumed it to be wrong, but as well, that the federal court was bound by the determination of a state court which was so sterile that it disregarded the Sec. 10(b) claim on which the Superintendent spent much time, energy and money to establish as a valid federal claim, and whose determination by the United States Supreme Court as a valid Sec. 10(b, claim undoubtedly led the financially responsible defendants to settle. Justice Brieant's conclusion is devoid of common sense.

In the final portion of its opinion, the Seventh Circuit, again quoting from *Movielab*, stated the following at CCH Fed.-Sec.L.Rep. P 98,274:

> "We deem it regrettable that these two proceedings should be progressing on separate courses, each racing to a conclusion before the other, which in their present respective postures can be satisfactorily resolved to no one. We commend to the parties the sage advice in *Movielab, supra*, at 810, reminding that:
>
> 'Our principal inquiry, therefore, should be as to whether all of the issues can be disposed of in one jurisdiction but not in the other. If so, in the interest of avoiding multiplicity and of promoting efficiency and economy of effort, the parties should be encouraged to resort to the forum where the entire controversy can be resolved.' "

If the Superintendent and the State Supreme Court had followed the sage advice of *Movielab* and *McGough*, the legal and justicial complications provided by the case at bar would have been avoided. The State Court should have declined jurisdiction to determine the fairness of the settlement of the Sec. 10(b) action, and left that as the exclusively federal province of the District Court. As argued by us on pages 14-15 of our main brief, it is a common sense solution to the state and federal interests involved which avoids a conflict between the two; it is the solution suggested by Professor Loss and the case of *Zuck-*

man so as to avoid the problem raised by the "exclusive" jurisdiction requirement of the Exchange Act; it is a sensible way to apply the principles of comity between federal and state courts so as to avoid needless friction. Since neither the Superintendent nor the State court saw fit to resolve the jurisdictional problem on a sensible basis, what they did, resulted not only in the making of a state court order which was null and void for lack of jurisdiction, but as well, one which leads to an absurd result: the approval of the settlement of a Sec. 10(b) case by disregarding the recovery potentials of that claim, and without giving consideration thereto. This court should not compound that absurdity by holding that the Federal court was ousted of its exclusive jurisdiction by the State court's wrongful usurpation of power.

On pages 9-10 of their brief, appellees cite as their main authority for their position that the State court had authority to determine the fairness of the settlement, the following *quotation** from *Re Knickerbocker Agency*, 4 NY2d 245, which in turn quotes from *Motlow v. Southern Holding*, 95 F.2d 721, 725-726:

> " 'Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence other courts, *except when called upon by the court of primary jurisdiction for assistance*, are excluded from participation. This should be particularly true as to proceedings for the liquidation of insolvent insurance companies'." (Emphasis ours).

*Appellees do not claim that the holding of *Knickerbocker Agency* is in point, and it is not. The issue in *Knickerbocker Agency* was whether the alleged debtors of a domestic insurance corporation in liquidation could insist on having their dispute determined by arbitration rather than by the State Supreme Court which appointed the liquidator.

We have emphasized the words "except when called upon by the court of primary jurisdiction for assistance" because they reflect the essence of what is involved in the case at bar. First, they show that even the New York Court of Appeals has recognized that circumstances might exist in which it would be desirable for a state court supervising a liquidation, to defer to another court. That is precisely the situation in the case at bar except that deference of the state court to the federal court was mandatory as differentiated from discretionary, because of the federal exclusivity statute which is involved. Second, the essence of what the New York Court of Appeals was talking about concerned non-interference by other courts with the "economical, efficient and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders." As we have pointed out on pages 14 to 15 of our brief, in the case at bar there were two mutually exclusive interests involved, neither of which interfered with the other, if sensibly interrelated. If the State court had followed the implications of the above quotation by deferring to the federal exclusivity of the Sec. 10(b) claim and holding that the federal court should determine the fairness of the settlement, this procedure could not conceivably have resulted in interference by the federal court in the state liquidation proceeding. On the contrary, not only would it have avoided the federal exclusivity problem, but as well, it would have secured the "economical, efficient and orderly liquidation and distribution" of MCC's assets "for the benefit of all creditors and stockholders", by having the matter of the fairness of the Sec. 10(b) settlement determined by the court best qualified to evaluate the potentials of the Sec. 10(b) claim. We submit that by handling this matter itself, the State court accomplished just the opposite of an economic, efficient and orderly liquidation for the benefit of the creditors and stockholders of MCC. It handled the matter as a common law matter, disregarding the fact that a Sec. 10(b) claim existed, thereby depriving the creditors and stockholders of MCC of a fair evaluation of the potentials of the Sec. 10(b) action because the state court was not qualified both by ex-

perience and Congressional mandate, to do so. The state court did not even carry out the implied mandate of *Re Knickerbocker Agency.*

On page 10 of their brief, the appellees also cite the case of *Katin v. Apollo Savings,* 318 F.Supp. 1055 (ND Ill. 1970) to support their position that the state court had authority to determine the fairness of the settlement. The teaching of *Katin,* however, is to the contrary. If, in the case at bar, the state court had applied the principles of *Katin,* it would have declined jurisdiction in deference to the federal court.

Katin involved state and federal court proceedings. But it did not involve any exclusively federal cause of action. On the contrary, it involved only state type causes of action. As stated by the court at 318 F Supp 1055, 1059: "First, it should be stressed that there is no question but that all of the relief sought here could be obtained in the state court proceedings." The sole claim to jurisdiction in the federal court was that the plaintiff had the right to bring the action in the federal as well as the state court, and since the plaintiff chose to bring it in the federal court, that court had a duty to adjudicate it. The federal court dismissed the action on the ground that the claims there asserted could be determined in the state court; that the complaint in the federal court was insufficient for failure adequately to allege reliance; and that the dismissed claims were certain to be paid in full in the state court (318 F Supp 1055, 1064). The fact that a receiver was involved did not determine the court's course of action. It was predicated upon the fact that:

> "In my opinion the statutes relied on do not grant jurisdiction under the facts of this case. Furthermore, even were jurisdiction clear, settled principles of comity as well as sound judicial administration, dictate that this court refuse jurisdiction in this case." (318 F. Supp 1055, 1060).

The court in *Katin,* pointed out that "for our dual court system to function properly, all needless friction between the state and federal courts must be religiously avoided" (318 F

Supp 1055, 1060) and since the federal court had at best, "only partial jurisdiction" (318 F Supp 1055, 1061), and could adjudicate only "portions of the claims" (318 F Supp 1055, 1061), whereas all of the claims could be litigated in the state court where the receivership was pending, the federal court should decline jurisdiction "consistent with settled principles of comity between federal and state courts" (318 F Supp 1055, 1061), so as to permit all claims to be adjudicated in the state court where the receivership was pending. This is the meaning of the *Katin* quotation that "federal courts are admonished not to interfere with these dissolutions, though we may have 'abstract' jurisdiction over the subject matter of *certain claims*," which is quoted by appellees on page 10 of their brief. The underscoring of the word "certain claims" is ours. We have underscored them as showing that the federal court declined jurisdiction basically as a matter of comity because it had possible "abstract jurisdiction" of only *part of the claims*, and comity between the federal and state courts, as well as common sense, indicated that, in such circumstances, the federal court should decline jurisdiction in favor of leaving it to the court with jurisdiction over all the claims to make the adjudication.

If the state court in the case at bar had followed the principles enunciated by *Katin*, it would have declined jurisdiction to pass upon the settlement for lack of Sec. 10(b) jurisdiction, and left it to the District Court for determination.

We submit that the above mentioned *City of Detroit* facts are relevant to a determination of whether the settlement in the case at bar is fair and reasonable regardless of whether the Supt.'s action on behalf of MCC is classified as derivative or representative. But even if this were not so, the fact is, contrary to what appellees argue on page 11 of their brief, that the Sec. 10(b) Federal action is clearly a derivative action. It is brought by the Supt on behalf of MCC to recover for wrongs done to MCC. As shown by the cases cited by us on page 35 of our main brief, it is a garden variety derivative action.

On pages 13-17 of their brief, appellees make a confused

argument to the effect that appellants have no standing to intervene in these proceedings as objectors, even though the Brandenburg estate is concededly the sole stockholder of MCC, and Berg is concededly a creditor of MCC, and both are taxpayers of the State of New York, and even though Judge Brieant assumed that the appellants are aggrieved by the settlement and further assumed that the public treasury of the State was adversely affected by the settlement which Judge Brieant assumed to be improvident and inadequate. In such circumstances, it is clear that the appellants have the right to intervene as objectors.

The role of objectors must be compared to that of a defendant summoned by process of the court.

Cohen v. Young, 127 F 2d 721, 724 (CA6, 1942), cert. den 321 US 778 (1944)

An objecting stockholder need not have been a stockholder at the time of the wrong complained of.

Cohen v. Young, 127 F 2d 721, 724 (CA6, 1942), cert. den 321 US 778 (1944)
Steigman v. Beery, 43 Del. Ch. 53, 203 A. 2d 463, 467 (Ch. 1964)

If the court approves the settlement, the objector has an absolute right to appeal.

Cohen v. Young, 127 F 2d 721, 724 (CA6, 1942), cert. den 321 US 778 (1944)
Ackert v. Ausman, 217 F Supp. 934, 935 (SDNY 1963)

The most important aspect of the appellants' position as objectors, is their right to be heard and to gather and present evidence to the court. It is only through the adversary position of the objector that the court can ascertain all the facts, especially those which mitigate against the settlement, and enable the court to make an enlightened determination. Where the court denies an objector the right to present a strong adversary position, the court will be reversed on the ground that it failed to live up to its fiduciary responsibility.

Girsh v. Jepson, No. 74-20[illegible] (3rd Cir, July 25, 1975), Annexed as an appendix to this reply brief

In the case at bar, the role of the appellants in the federal court, is to show not only that the State court had no jurisdiction to pass upon the settlement, but as well, that the settlement is unfair and unreasonable and that appellants were deprived in the State court of their right to develop an adversary record. In these circumstances, for appellees to argue that appellants have no standing, is to fly in the face of established authority.

On page 17 of their brief, appellees make a further argument that the Brandenburg Estate is foreclosed by res-judicata from opposing the settlement. For this argument, the appellees go outside the record and point to two actions commenced by Brandenburg in the Federal and State courts, which were dismissed for lack of prosecution.

When the argument was made for the first time in the State Appellate Division, appellants' attorney contacted Morton Schlossberg, attorney for the appellees, with the request that appellants' attorney be permitted to look at Mr. Schlossberg's files of the cases. Mr. Schlossberg replied that he really had no information about the cases, and had no files. He did, however, give the attorney for appellants the index numbers of both cases.

An investigation of the clerk's index books in those courts revealed that the so-called Brandenburg actions were commenced *after* the Supt commenced the actions in the case at bar, and were *personal* actions brought by Brandenburg. MCC was neither a party plaintiff nor a party defendant. There was no endeavor to bring an action on behalf of MCC. Hence they could not conceivably have any bearing on the case at bar which is brought by the Supt on behalf of MCC.

Since the action at bar is an asset of MCC, neither Brandenburg nor his Estate had the right to prosecute them on behalf of MCC. By the terms of the liquidation order of May 24, 1963, only the Supt had the right to do this. Hence, the argument that either Brandenburg or his Estate is foreclosed by res judicata

from asserting any claim in opposition to the settlement by reason of the undefined litigation which is not a part of the record of this case, is specious. Until the Supt sought court approval of the proposed settlement, there was nothing that either Brandenburg or his Estate could have done in connection with this litigation. It belonged to MCC, and by State court order, only the Supt had the right to prosecute the litigation on behalf of MCC. Thus, nothing that Brandenburg or his Estate might have done in connection with any other litigation could have affected the right of Brandenburg or his Estate to intervene in the MCC litigation as an objector.

POINT II

APPELLEES ARGUE THAT THIS COURT SHOULD DISREGARD THE FACTS AND LAW CONCERNING DUE PROCESS, IN THE SAME WAY AS THE STATE COURT DID

(Answering Appellees' Point II)

The recent case of *Girsh v. Jepson*, No. 74-2030, decided by the United States Court of Appeals for the Third Circuit on July 25, 1975 which has been previously referred to by us in this reply brief, the opinion being annexed hereto as an appendix, is a significant authority with reference to appellants' argument that the state court deprived them of due process.

Girsh, involved consolidated class and derivative actions which were pending in the District Court. After a stipulation of settlement was entered into by the litigants, application was made to the District Court for approval of the settlement, and a date for a hearing on the fairness of the settlement was fixed by the court. Frackman, a stockholder, indicated her intention to object to the settlement.

Approximately one week prior to the date fixed for the hearing, Frackman moved for an adjournment of the hearing

"to enable proper preparation for that hearing." This application was denied by the district court. She also filed four sets of interrogatories to plaintiffs' counsel, but none of these interrogatories was answered. Answers were not required because plaintiffs' counsel had examined the documents sought by Frackman through the medium of her interrogatories. Frackman was not served with the affidavits relied upon by the settlement participants to demonstrate the fairness of the settlement, until the day before the settlement hearing was held.

A settlement hearing was held, and the District court approved the settlement. Among other things, the settlement agreement provided for the compromise of all claims against one Gluck and Price Waterhouse including a Sec. 16(b) claim against Gluck. But in determining the fairness of the settlement, the District Court did not specifically deal with any Sec. 16(b) claim against Gluck or with the precise claim against Price Waterhouse.

On appeal to the United States Court of Appeals for the Third Circuit, that court reversed the District court and held that the District Court "did not live up to its fiduciary responsibility, as the guardian of the rights of the absentee class members in approving the settlement based upon the inadequate record before it." (p. 9). In this connection the Court of Appeals said at pages 9 to 11:

> "We believe that objector Frackman was not afforded an adequate opportunity to test by discovery the strengths and weaknesses of the proposed settlement. Soon after her notice of intention to object was filed, Frackman submitted four sets of interrogatories to the Fund, to plaintiffs' counsel in *Girsh*, to Price Waterhouse & Co., and to plaintiff's counsel in *Helfand*. None of these interrogatories were ever answered. It is little comfort to objector Frackman that *plaintiffs' counsel* may have examined the documents sought by objector during the course of its discovery. As an objector, Frackman was in an adversary relationship

with both plaintiffs and defendants and was entitled to at least a reasonable opportunity to discovery against both.

"In *Greenfield v. Villager Industries, Inc., supra* at 833, we wrote:

'It is not unusual for objections to be presented at a hearing on a proposed settlement of a class action, [footnote omitted] and it is elemental that an objector at such a hearing is entitled to an opportunity to develop a record in support of his contentions by means cross examination and argument to the court . . . '

"Such an 'opportunity to develop a record' was denied to Frackman by the totality of the circumstances surrounding the settlement hearing. Not only was Frackman's attempt to compel answers to her interrogatories thwarted by the order of the district court, but her opportunity to participate effectively in the settlement hearing, through cross examination and argument, was also frustrated by the late filing of the affidavits upon which plaintiffs and defendants relied to demonstrate the fairness of the settlement. Objector asserts, and neither plaintiffs nor defendants dispute, that her attorneys did not receive the affidavits submitted in support of the settlement until the day before the settlement hearing was held. Since the date of the settlement hearing had been known by the parties for more than four months, we cannot understand, and the record reveals no explanation, why there was such a long delay in the submission of these affidavits. On her part, Frackman made repeated efforts, through timely filed motions, to obtain answers to her interrogatories and to continue the date of the settlement hearing. In our view, from the time objector Frackman became actively involved in this case, she did everything within her power to prepare for the settlement hearing. Nevertheless, the actions of the district court and her adversaries combined to deny her meaningful participation in that hearing."

So far as the claims against Gluck and Price Waterhouse were concerned, the Court of Appeals held that the District Court could not conceivably have determined whether the settlement of these claims was fair and adequate because it did not specifically consider them, and the factual record had not been properly developed in such fashion as to permit the kind of consideration which the District Court's fiduciary responsibility required. In this connection the court said on P 14:

> " '. . . It is essential . . . that a reviewing court have some basis for distingushing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law . . .' *Protective Committee v. Anderson,* 390 U.S. 414, 434 (1968) (dealing with the compromise of claims in bankruptcy); *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, No. 74-1936 (3d Cir., July 10, 1975); *Bryan v. Pittsburgh Plate Glass Co., supra.*"

The facts of the case at bar are very similar to those in *Girsh.* As shown on pages 20-33 of our main brief, prior to the hearing before the State court referee, the appellants requested copies of the papers which would be used by the Supt to support the fairness of the settlement, and the right to examine the Supt's witnesses on a pre-hearing basis. This was denied (Brief P 20). At the hearing, the referee admitted into evidence completely incompetent papers and denied the appellants any kind of cross examination or opportunity to develop a record on an adversary basis. (Brief Pp. 20-34). Not only did the State court disregard any consideration of MCC's potential of recovery under Sec 10(b) by treating the federal action as if it were a common law action, but as well, the State court disregarded patent facts and well established law (Brief Pp. 34-38).

In point II of their brief, appellees do not attempt to refute, by specific reference to the record, the claims of appellants. This is because they cannot do so. Instead, they rely on their general

statement that appellants were given a fair hearing in the state court, and turn to appellants argument commencing page 28 of appellants main brief, that the State court disregarded the plain meaning of evidence presented by the Supt which clearly reveals that the $1,000,000 will not provide enough assets for MCC to pay its creditors. In particular, appellees, on page 21 of their brief, refer to the argument made on pages 29-30 of appellants main brief, that the Supt's witnesses had no information concerning the vital "securities" figure, and that judicial notice could be taken that the December 1972 figure was inadequate because of the decline in the Securities market since that time. Appellees' response to this argument of the appellants is that appellants have been told *dehors the Record* that the value of the securities had in fact increased between December 31, 1972 and February 13, 1975 (appellees' brief pp. 21-22). The appellees do not refer to any portion of the hearing Record to sustain their claim, because it is disavowed by the Record.

As shown on pages 28 to 29 of appellants' main brief, one of the items on the asset part of the "Statement of Assets and Liabilities of MCC as at Dec. 31, 1972" (A 57-59), was "Securities (Market Value December 31, 1972". Minches, the witness called by the Supt to give testimony concerning this document, knew absolutely nothing about the Securities. We quote the following salient portion of the Record (122-124):

"Q. There is an item here of securities. Market Value December 31, 1972. Will you give us a list of those securities?

A. I don't have a list of those securities.

Q. Did you ever consult a list of those securities?

A. Personally, no.

Q. What is the value of those securities as of March 31?

A. I have no idea.

Q. Were those securities taken in at the cost basis?

A. I have no idea.

Q. Who purchased those securities?

A. I don't know.

Q. When were they purchased?

A. I don't know.

Q. Was any consideration here given to whether any commission would have to be paid when those securities were sold?

A. I don't know.

Q. Was any consideration given to whether any tax would have to be paid when those securities were sold?

A. I don't know.

Q. Mr. Minches, when will the liquidation of Manhattan Casualty be completed?

A. I can't answer that.

Q. Will it be within a week?

A. No, sir.

Q. Will it be within a month?

A. No, sir.

Q. Will it be within a year?

A. No, sir.

Q. Will it be within two years?

A. It is entirely possible that many steps could be taken in the two years to come close to completing the liquidation.

Q. Isn't it possible that these securities will, within two years, have a much lesser value than as of December 31, 1972?

Mr. Schlossberg: Objection.

The Referee: Sustained.

Q. Did you give any consideration as to what value the securities would have when the monies have been distributed to the creditors?

The Referee: That is the same question.

Objection sustained."

Appellees would now have this court disregard their failure to produce the above crucial facts for the hearing, and the egregious action of the referee in sustaining the refusal of the

appellees to produce the evidence, by the bald statement without any hearing Record to back it up, that as of February 13, 1975, long after the hearings were held, the cash and securities item had increased. Apart from the fact that there is nothing of evidentiary competence to support this claim, it is significant that the appellees do not address themselves directly to the argument concerning the value of the securities, but rather lump the so-called value of the securities together with cash, to make one total for cash *and* securities.

By making the above claim concerning the February 13, 1975 value of cash and securities, appellees have now conceded the materiality thereof to the situation at bar. Since there is nothing in the record to sustain the competence thereof, appellants should have the right, by a hearing in the federal court, to test the competency thereof by cross examination and an adversary hearing. Many questions which require answer if the truth is to be ascertained, are raised.

What securities are appellees talking about? What is their value apart from the cash? In light of the December 31, 1972 valuation, and what has happened to the securities market—certificate of deposit and treasury notes included—since then, are appellees talking about securities held on December 31, 1972 and still held, or securities acquired since then? Further, the relation of any single item to the sufficiency of assets with which to pay the claims of MCC creditors, is meaningless unless given in the context of *all the liabilities of MCC.* This requires a full and complete adversary hearing in the federal court. By arguing that appellants have been given information which appellees now admit is significant, dehors the record, without benefit of an adversary hearing thereon, the appellees in effect concede that the state court violated appellants' constitutional due process rights.

CONCLUSION

THE DETERMINATION BELOW SHOULD BE REVERSED

Respectfully submitted,

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Dated: New York, N.Y.
Sept. 25, 1975

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2030

MEYERS L. GIRSH, HERMAN and DOROTHY GREENFIELD, GEORGE H. ENTIN, and DAVID and DOROTHY STEINBERG, derivatively and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

ROBERT S. JEPSON, JR.,
MAXWELL H. GLUCK,
DONALD I. REIFLER,
MERRILL BOTHAMLEY,
RICHARD LEAVITT;
DANIEL W. BURNS,
ROBERT J. BRADLEY,
WILLIAM K. GUMPERT,
HUBERT I. ROSENBLUM,
ROBERT J. McGUINNESS,
MELVIN L. DUCHIN,
RICHARD B. LENG,
GERALD L. SALZMAN,
JOSEPH D. CARRABINO,
NEW AMERICA FUND, INC.,
FUND MANAGEMENT CORPORATION,
PORTFOLIO MANAGEMENT CORPORATION,
PRICE WATERHOUSE AND COMPANY,

Defendants-Appellees,

LYNN SARA FRACKMAN,

Objector-Appellant.

(D.C. Civil No. 72-2035)

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No. 74-2031

ROBERT HELFAND, Suing Derivatively in the Right and on Behalf and for the Benefit of NEW AMERICA FUND, INC.,

Plaintiff-Appellee,

v.

NEW AMERICA FUND, INC.,
FUND MANAGEMENT CORPORATION,
PORTFOLIO MANAGEMENT CORPORATION,
DONALD I. REIFLER,
MERRILL BOTHAMLEY,
RICHARD B. LEAVITT,
DANIEL W. BURNS,
ROBERT J. BRADLEY,
WILLIAM K. GUMPERT,
HUBERT I. ROSENBLUM,
ROBERT J. McGUINNESS,
ROBERT S. JEPSON, JR.,
MAXWELL H. GLUCK,
MELVIN L. DUCHIN,
RICHARD B. LENG,
GERALD L. SALZMAN,
JOSEPH D. CARRABINO,
PRICE WATERHOUSE AND COMPANY,

Defendants-Appellees,

LYNN SARA FRACKMAN,

Objector-Appellant.

(D.C. Civil No. 73-652)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Argued April 28, 1975

Before: Van Dusen, Adams and Garth, *Circuit Judges*

OPINION OF THE COURT

(Filed July 25, 1975)

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OPINION--GIRSH ET AL. v.
JEPSON, ET AL.

GARTH, *Circuit Judge*

On this appeal, Petitioner Frackman challenges the district court's order dismissing her objections and approving a settlement agreement. The district court, in its order of June 25, 1974, approved the settlement of a class and derivative action alleging violations of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b), the Investment Companies Act of 1940, 15 U.S.C. §80a-33b and 35, the Investment Advisors Act, 15 U.S.C. §80b-6, and Rule 10b-5 of the Securities and Exchange Commission. Because we believe that the record before the district court was not sufficiently developed and cannot, therefore, support the district court's approval of the settlement agreement we remand to the district court for further proceedings as indicated in this opinion.

The present appeal involves two cases which were consolidated by the district court for purposes of discovery and settlement.[1] *Girsh v. Jepson* was commenced as a class action on October 18, 1972, on behalf of all persons who purchased shares of the New America Fund between September 20, 1968, the date of the public offering, and December 31, 1790. Named as defendants in the *Girsh* action were: (1) the New America Fund, Inc. (hereinafter, "Fund"), a Delaware corporation, whose common stock is registered with the Securities and Exchange Commission and traded on the over-the-counter market;[2] (2) Fund

1. The district court's opinion is reported as Helfand v. New America Fund, Inc., 64 F.R.D. 86 (E.D. Pa. 1974).

2. The complaint identifies the Fund as ". . . a closed-end diversified investment company of the management type. . . ." It further recites that the name of the Fund was changed by vote of the shareholders on December 16, 1971, from "Fund of Letters, Inc." to "New America Fund, Inc."

Management Corporation, an investment advisor; (3) Portfolio Management Corporation, the parent corporation of Fund Management Corporation; (4) various individual defendants who were officers, directors and shareholders in the above named corporate defendants; and, (5) Price Waterhouse and Company, the Fund's auditor. The complaint alleged in Count 1 violations of Section 10(b) of the Exchange Act and Rule 10b-5 in that defendants filed a "false and misleading prospectus with the Securities and Exchange Commission." In Count 2, plaintiffs alleged violations of the Investment Company Act of 1940, Sections 34(b) and 36, in that among other things, ". . . Defendants violated their fiduciary duty with respect to compensation for services. . . ." In Counts 3 and 4, certain plaintiffs sought derivative recovery on behalf of the Fund based upon "Defendants' usurpation of [a] valuable business opportunity. . . ."

The complaint in *Helfand v. New America Fund, Inc.*, the case consolidated with *Girsh v. Jepson*, was filed on March 23, 1973. The defendants were identical to those named in the *Girsh* complaint. The *Helfand* case was brought as a derivative action alleging violations of the Investment Company Act of 1940, Sections 34(b), 36(a) and (b); the Investment Advisers Act, Section 206; and, the Exchange Act, Section 10(b) and Rule 10b-5. Specifically, the complaint alleged, among other things, that the defendants had charged the Fund excessive advisory fees, over-valued the Fund's assets, invested in highly speculative securities without adequately disclosing the risk involved, and usurped valuable business opportunities.

Soon after discovery commenced, the parties entered into settlement negotiations. These negotiations resulted in a "Stipulation of Settlement" which was filed in the district court on November 9, 1973. On November 21, 1973, the district court entered an order constituting ". . . a class action . . . for the purpose of effectuating the settlement of the cases pursuant to the Stipulation of Settlement.

. . . ."[3] The order set March 20, 1974, as the date for a hearing on the fairness and adequacy of the proposed settlement. The order directed that individual notice of the settlement hearing be sent by mail to all record holders of Fund shares as of the close of business on October 12, 1973. Concluding that the identity of class members who had ceased to be shareholders prior to October 15, 1973, ". . . cannot be determined without unreasonable expense and delay . . . ," the district court directed notice to these individuals as follows: individual notice by mail to ". . . persons who were shareholders of record of the Fund and entitled to vote at the annual meetings of shareholders of the Fund held during the calendar years 1969 and 1970 . . . ;" to those whose names did not appear on the annual meeting list, the court directed ". . . notice by publication . . . in the Eastern, Middle Western and Pacific Coast editions of The Wall Street Journal on two business days per week in each of two consecutive calendar weeks. . . ."

The Stipulation of Settlement provides for the payment of the following amounts by the following defendants: (1) Fund Management Corporation and its parent corporation agreed to pay $55,000 to the Fund and to reduce from its investment advisor's fee $12,500 quarterly, ". . . for as long as FMC remains the investment advisor to the Fund but in no event longer than 46 consecutive quarterly periods;" (2) Maxwell Gluck, a major shareholder, agreed to pay $10,000 to the Fund ". . . in settlement of all claims made against him in the Complaints or which might have been made by the plaintiffs or the Fund under any applicable law including particularly the provisions of Section 16(b) of the Securities Exchange Act of 1934;" (3) the Fund agreed to pay $400,000, less counsel fees and costs, to Fund Claimants (purchasers of Fund stock during the period covered by the settlement agreement).

3. There is no impediment to determining a class action for the purpose of settlement only. Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973).

On March 1, 1974, objector/appellant Frackman indicated her intention to object and moved in the district court to extend the time to file papers in support of her objections to the proposed settlement. By order of March 4, 1974, the district court permitted an extension until March 11, 1974. Thereafter, on March 11th, Frackman filed her objections to the proposed settlement specifying, among other grounds, the inadequacy of the settlement fund, the sparseness of the record, and the failure of certain defendants to contribute toward the settlement.[4]

On the same date, March 11, 1974, Frackman moved to continue the date fixed for the settlement hearing ". . . to enable proper preparation for that hearing. . . ."[5] This motion was denied by the district court on March 20, 1974, at which time the settlement hearing was held.[6] On June 25, 1974, the district court entered a Memorandum and Order approving the settlement agreement and dismissing Frackman's objections. As previously indicated, we believe that a remand is required and we so order.

I.

The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the

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4. In all, Frackman listed nine major objections, some with sub-categories. We need not discuss each separate objection here since it will be the function of the district court on remand to consider each such objection in light of a more expanded record. We express no opinion as to the merits of Frackman's objections.

5. In her motion papers, Frackman detailed the reasons why she believed that a continuance of the March 20, 1974, date for the settlement hearing was in order.

> . First, the Court file is so sparse as to pre-trial discovery that an evaluation of claims is difficult at best and probably impossible. . . . Second, it is quite likely that even if the interrogatory answers are filed on March 13th the objecting plaintiff's counsel will not receive them until March 15, 1974, too short a time prior to the hearing date for proper preparation. Third, further discovery, whether by further interrogatory, oral deposition or other method, may well be required if objecting plaintiff is to be adequately prepared for the settlement hearing."

6. A written order denying the motion to continue the March 20, 1974, hearing was not entered until March 26, 1974. In the same order, the district court granted the joint motion of plaintiffs and defendants that Frackman's interrogatories not be answered.

district court.[7] Some of the factors which are relevant to a determination of the fairness of a settlement were listed by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) as follows:

> ". . . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . ."

495 F.2d at 463. *See Bryan v. Pittsburgh Plate Glass Co., supra.*

We note that the district court referred to the nine factors listed in *Grinnell*, among others, in reaching its conclusion that the proposed settlement was fair, adequate and reasonable. Nevertheless, we believe that the district court did not live up to its fiduciary responsibility, as the guardian of the rights of the absentee class members in approving the settlement based upon the inadequate record before it. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973).

We believe that objector Frackman was not afforded an adequate opportunity to test by discovery the strengths and weaknesses of the proposed settlement. Soon after her notice of intention to object was filed, Frackman submitted

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7. We will reverse the district court's approval of a class settlement only for a clear abuse of discretion. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.) *cert. denied*, 419 U.S. 882 (1974); Kohn v. American Metal Climax, Inc., 489 F.2d 262, 264 (3d Cir. 1973); *see* Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972).

four sets of interrogatories to the Fund, to plaintiffs' counsel in *Girsh*, to Price Waterhouse & Co., and to plaintiff's counsel in *Helfand*. None of these interrogatories were ever answered.[8] It is little comfort to objector Frackman that *plaintiffs' counsel* may have examined the documents sought by objector during the course of its discovery. As an objector, Frackman was in an adversary relationship with both plaintiffs and defendants and was entitled to at least a reasonable opportunity to discovery against both.

In *Greenfield v. Villager Industries, Inc., supra* at 833, we wrote:

> "It is not unusual for objections to be presented at a hearing on a proposed settlement of a class action, [footnote omitted] and it is elemental that an objector at such a hearing is entitled to an opportunity to develop a record in support of his contentions by means cross examination and argument to the court . . . ."

Such an "opportunity to develop a record" was denied to Frackman by the totality of the circumstances surrounding the settlement hearing. Not only was Frackman's attempt to compel answers to her interrogatories thwarted by the order of the district court, but her opportunity to participate effectively in the settlement hearing, through cross examination and argument, was also frustrated by the late filing of the affidavits upon which plaintiffs and defendants relied to demonstrate the fairness of the settlement. Objector asserts, and neither plaintiffs nor defendants dispute, that her attorneys did not receive the affidavits submitted in support of the settlement until the day before the settlement hearing was held. Since the date of the

8. The Fund, Fund Management Corporation and various individual defendants responded to Frackman's interrogatories by indicating that the documents requested by the objector had already been made available to *plaintiffs' counsel*. In turn, plaintiffs' counsel and defendants' counsel jointly moved at the settlement hearing to deny Frackman's request to compel answers to interrogatories. This motion was granted orally at the settlement hearing and was followed by a written order to the same effect on March 26, 1974.

settlement hearing had been known by the parties for more than four months, we cannot understand, and the record reveals no explanation, why there was such a long delay in the submission of these affidavits. On her part, Frackman made repeated efforts, through timely filed motions, to obtain answers to her interrogatories and to continue the date of the settlement hearing. In our view, from the time objector Frackman became actively involved in this case, she did everything within her power to prepare for the settlement hearing.[9] Nevertheless, the actions of the district court and her adversaries combined to deny her meaningful participation in that hearing.

II

We are not satisfied that the best notice practicable under all the circumstances was provided to class members. It is now well established that, ". . . [I]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). As indicated *supra* pp. 6-7, the district court directed individual mail notice to shareholders who were of record on three separate days. As to all other class members, pub-

9. The settling parties argue that Frackman was herself delinquent in her requests for discovery. They point out that she received notice of the proposed settlement in December, 1973, but waited until March 1, 1974, to become actively involved in the case. We have considered Frackman's delay as a factor in determining whether she was afforded the rights to which she is entitled under our decision in Greenfield v. Villager Industries, Inc., *supra*.

We note the distinction between this case and our earlier decision in Kohn v. American Metal Climax, Inc., 489 F.2d 262 (3d Cir. 1973). There, we rejected appellants' contention that ". . . the procedural incidents of the hearing, especially those relating to discovery and cross-examination, were inadequate. . . ." 489 F.2d at 264. That was, however, in a context in which:

> ". . . appellants did not seek discovery prior to the hearing, or seasonably request additional time to prepare for examination of witnesses. Instead, appellants made a general request for discovery at the hearing, and declined to examine the parties that were present at the hearing. Moreover, the appellants did not utilize the opportunity prior to the hearing to marshall any evidence indicating that the settlement should not receive court approval or to analyze in any way the vast amount of evidence already in the record . . . ."

Id. Contrast the present case in which Frackman actively sought discovery within days after she filed her notice of intention to object; requested a continuance; and, had limited or no access to evidence already in the record.

lication notice was required. The only evidence indicating that this combination of notice by mail and publication was the best notice that could be provided "through reasonable effort" appears in the affidavit of Gerald L. Salzman, which was one of the affidavits made available to Frackman's counsel the day before the settlement hearing.[10] We believe that the late date at which Frackman's counsel received this affidavit prevented effective cross-examination of Salzman as to the adequacy of the notice and foreclosed effective attempts to produce evidence in rebuttal of Salzman's conclusions.[11] Salzman was not cross-examined at the settlement hearing in regard to the "adequacy of notice" issue. Nor was opposing testimony, in the form of affidavits or otherwise, submitted to dispute Salzman's conclusion. *See* note 11 *supra*. We cannot say that the district court would have reached the same conclusion as to the adequacy of notice, had Frackman been afforded a fair opportunity to meet the assertions made in the Salzman affidavit. This is especially so in light of this Circuit's strong policy in favor of "maximum notice."[12]

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10. The docket sheet indicates that the Salzman affidavit, along with the other affidavits submitted in support of the settlement, were not filed until March 21, 1974, the day after the settlement hearing.

11. In his affidavit, Salzman stated that he had been informed by officers of the Fund's transfer agent that, ". . . it would be prohibitively expensive to prepare a list of all the shareholders of the Fund at every point in time . . . ." An effective contest of this representation, or any of the other "facts" leading to Salzman's conclusion that ". . . the notice that was given was the best notice practicable under the circumstances," would undoubtedly require more than one day in order to marshall opposing facts and testimony. Yet, by the settling parties' decision to wait until March 19, 1974, the day before the settlement hearing, to submit affidavits, Frackman was limited to one day's preparation time.

12. In Greenfield v. Villager Industries, Inc., *supra* at 831, we stated in relevant part:

> "A procedure such as the class action, which has a formidable, if not irretrievable, effect on substantive rights, can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee class member, *i.e.*, [T]he best notice practicable under the circumstances including individual notice. . . ."

We do not mean to indicate that individual notice must be given in all cases. Among other things, we are concerned here, however, with the expense and feasibility of preparing a complete list of stockholders—questions left open by the Salzman affidavit. We are also concerned with the *facts* in regard to the Bank of California records as distinct from Salzman's *"doubts"* as to the availability and completeness of these records.

III

We are satisfied that the fairness and adequacy of the settlement agreement, insofar as the claims against Maxwell Gluck and Price Waterhouse & Co. are concerned, cannot be determined from the record in its present form.

As indicated *supra*, p. 7, the settlement agreement provides for the compromise of all claims against defendant Gluck for $10,000.00, including claims based upon Section 16(b) of the Exchange Act of 1934. Frackman asserts that the § 16(b) claim ". . . did not appear in the *Helfand* or *Girsh* complaints or in any subsequent pleadings . . . ." She further argues that:

> ". . . Not one fact is in the record . . . as to the nature of this claim or its potential recovery value . . . . [T]he objector and the Court had absolutely no idea whatsoever of the amount of short-swing profits that Gluck realized . . . ."

Objector's Brief at 43-44.

The district court did not specifically deal with the Gluck settlement and we are, therefore, at a loss and without the benefit of its analysis as to why $10,000.00 was a fair and adequate settlement of *all* claims against defendant Gluck. It may be that the $10,000.00 contribution is overly generous. On the other hand, it may be grossly inadequate. The determination as to the fairness of this aspect of the settlement must depend upon facts still to be developed. On this state of the record, we have no other recourse but to require such a factual development on remand.

Similarly, we are not satisfied that the opinion explains why Price Waterhouse & Co. is contributing nothing toward the proposed settlement. The district court's only separate consideration of the claim against Price Waterhouse appears not in the section of its opinion discussing liability but rather in that portion of its opinion analyzing the ability of the defendants to withstand a greater judg-

ment. There, the district court comments that Price Waterhouse's ". . . possible liability is questionable . . . ." This conclusion is devoid of factual support in the record, and, as such, we cannot properly perform our function of evaluating the district court's exercise of discretion in concluding that the settlement was fair and adequate. ". . . It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law . . . ." *Protective Committee v. Anderson*, 390 U.S. 414, 434 (1968) (dealing with the compromise of claims in bankruptcy); *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, No. 74-1936 (3d Cir., July 10, 1975); *Bryan v. Pittsburgh Plate Glass Co., supra.*

IV

In remanding for a more complete development of the record and for an articulation by the district court of the relevant factors on which it relied in approving the settlement, we express no opinion on the merits of the proposed settlement agreement. That decision, in the first instance, is to be made by the district court in light of the record to be developed by the parties.

Nor by our remand do we suggest that a record appropriate to a trial on the merits is required. We recognize that the task of the district court is to determine whether the proposed settlement should be accepted and approved—a determination substantially different than a decision on the merits *Bryan v. Pittsburgh Plate Glass Co., supra* at 804. However, in order to satisfy even the less rigorous evidential requirements for settlement approval, the district court must at least evaluate all the contentions of the parties and provide any objectors with an opportunity for meaningful exposition of their positions. Since that was not done here, we will vacate the order of the district court

approving the settlement and dismissing Frackman's objections and will remand for further proceedings consistent with this opinion.[13] Each party will bear its own costs.

13. In addition, we will expect the district court to adhere fully to the notice requirements of Eisen v. Carlisle & Jacquelin, *supra*, and Greenfield v. Villager Industries, Inc., *supra*. *See* Fed. R. Civ. P. 23.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

ANNENBERG - Supt. of Ins. v. Bankers

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Sept. , 1975 deponent served the within Reply Brief upon .

JOSEPH J. MARCHESO, 1251 Ave. of the Americas, NYC 10020;
WINTHROP, STIMPSON, PUTNAM & ROBERTS, 40 Wall St., NYC;
SULLIVAN & CROMWELL, 48 Wall St., NYC;
SEITS & SHAPERO, 110 East 42nd St., NYC
JILLSON, BEDFORD & HOPPEN, 115 Broadway, NYC;
NEW ENGLAND NOTE CORP. c/o Clerk of the Court, U.S. District Ct.,
attorney(s) for
U.S. Courthou-e, Foley,Square, NYC 10007;
STANDISH T. BOURNE, JR., R.D. No. 2, Allentown, Pa. 18102;
and
JOHN F. SWEENEY, c/o Clerk of the Court, U.S. Dist. Court, U.S. Courthouse, Foley Sq., NYC 10007

in this action, at

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
24 day of Sept. , 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 23 day of April, 1975 at No. 125 Fire Olympic Place deponent served the within Brief upon Joseph D. Marbeau the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 24 day of April 1975

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973